



# Adjusting COVID-19 Protocols Amid the Rise of the Delta Variant

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- Rise of the Delta variant
  
- New CDC Recommendations:
  - Fully vaccinated people should wear masks in public indoor settings in areas of substantial or high transmission
  - Fully vaccinated people who come into close contact with someone with suspected or confirmed COVID-19 should be tested 3-5 days after exposure and wear masks indoors for 14 days or until they receive negative test result
  
- New Requirements for Federal Contractors:
  - All on-site contractors must be fully vaccinated or be tested weekly or biweekly, mask and socially distance

- Generally, employers can mandate vaccination as a condition of employees returning to office
- However, employers must provide reasonable accommodations to:
  - Employees who cannot be vaccinated for disability-related reasons; and
  - Employees who refuse the COVID vaccine because of sincerely-held religious beliefs
- Employers must engage in the interactive process with employees to determine reasonable accommodation
- But:
  - Be aware of state law
  - Think about disparate impact/discriminatory enforcement

- COVID-19 vaccine mandates have been upheld
  
- Houston Methodist Hospital Case
  - Group of employees challenged Houston Methodist Hospital's policy of requiring employees to be vaccinated against COVID-19 as a condition of continued employment
  - Employees who refused to be vaccinated sued, claiming wrongful termination
  - Court dismissed case
  - Statutory language concerning EUAs that requires that emergency product recipients understand "the option to accept or refuse administration of the product" did not impose a restriction on private employers.
  
- DOJ Memo: EUA status of COVID-19 vaccine does not prohibit entities from requiring it
  - EUA statute "concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs."

## Accommodating Employees with Disabilities

- Employer must show that unvaccinated employee would pose “direct threat” due to “significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”
- Employers must conduct individualized assessment of whether there is direct threat, but conclusion that unvaccinated person will expose others to virus at workplace is direct threat
- Employer must then determine whether reasonable accommodation would eliminate risk (i.e., additional protective gear, physical barriers, moving employee workstation)
- Employer cannot exclude employee from workplace or take other action unless there is no way to provide reasonable accommodation that would eliminate or reduce risk

# Accommodating Employees with Sincerely-Held Religious Beliefs

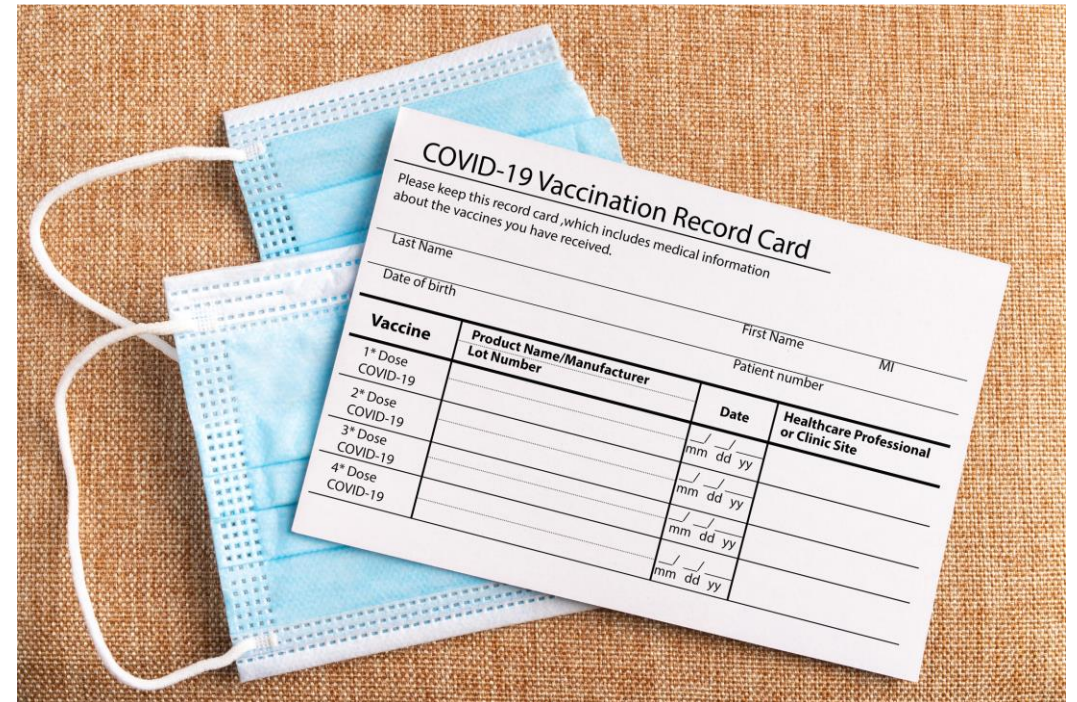
- Employers should assume that request for religious accommodation is legitimate before requesting supporting information
- If employer has objective basis for questioning either religious nature or sincerity of belief, requesting additional supporting information is justified
- If no reasonable accommodation is possible, then it is lawful to exclude employee from workplace

- Mandating vaccinations would likely be deemed mandatory subject of bargaining
  - Employers must give notice to and bargain with union prior to implementation of vaccine mandate
  
- Broad management rights or health and safety provision may permit employer to implement vaccine mandate without decisional bargaining
  
- Employer still may have obligation to engage in effects bargaining over effect vaccine mandate has on union employees



- If employer requires employees to get COVID-19 vaccination from employer or its agent, ADA's restriction on employer disability-related inquiries and medical examinations apply to screening questions that must be asked prior to administration of vaccine
  - Questions must be job-related and consistent with business necessity
  - Employer must have reasonable belief, based on objective evidence, that employer who does not answer questions, and therefore cannot be vaccinated, poses a direct threat to health or safety
  - Employee may challenge mandatory pre-vaccination inquiries
  
- Restriction does not apply where employee is vaccinated on a voluntary basis

- Asking or requiring employee to show proof of vaccination status is not “disability-related inquiry”
  - However, follow-up questions may be problematic
  - EEOC: Info about employee’s COVID-19 vaccination is confidential medical information under ADA and must be kept confidential and stored separately from personal files



- EEOC: under certain circumstances, employers may offer incentives to employees who receive COVID-19 vaccines
  - Must comply with discrimination laws
  - Incentive must not be so substantial as to be coercive



- COVID-19 has made us all aware of health information that is not shared with others, such as test results, illness, and vaccination status
  
- It is important to remember that while this information is not shared and may be “sensitive,” it is not protected by HIPAA or state health care privacy laws, unless held by a HIPAA covered entity.
  
- What are HIPAA covered entities?
  - Health care providers
  - Health care clearinghouses
  - Health plans:
    - Health insurance companies
    - HMOs, or health maintenance organizations
    - Employer-sponsored health plans
    - Government programs that pay for health care, like Medicare, Medicaid, and military and veterans’ health programs

- Some people in the public eye, when asked by the press about their vaccination status, responded with statements like this:

“Well your first question is a violation of my HIPAA rights,” [the member of Congress] replied. “You see with HIPAA rights, we don’t have to reveal our medical records and that also involves our vaccine records.”
- HIPAA does not prohibit *anyone*, including employers, from asking anyone else, including employees, about their:
  - Test results
  - Illness
  - Vaccination status
- Once that information has been provided, it should be kept confidential and only used for matters relating to workplace safety.

- Can you share with fellow employees an employee's:
  - Test results?
  - Illness?
  - Vaccination status?
  - Status working from home and not being allowed in the office [which likely telegraphs that they are not vaccinated]?
  
- But ask:
  - Is the disclosure necessary?
  - Are there other, less intrusive ways to protect the employee information and your workforce?
  
- Just because you *may* disclose some information does not always mean that you *should*.



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